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United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
WASHINGTON, D.C. 20240



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DIVISION OF
OIL GAS & MINING

Dianne R. Nielson, Ph.D.
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Dear Dr. Nielson *D. Nielson*

This is in response to your April 29, 1991, request for informal review of the Albuquerque Field Office (AFO) Director's determination that your agency has not taken appropriate action or shown good cause for not taking appropriate action with respect to ten-day notice (TDN) numbers 91-02-116-003 (PacifiCorp Electric's Cottonwood/Wilberg Mine) and 91-02-246-001 (Deer Creek Mine, respectively). The ten-day notices allege that the permittee failed to first obtain a permit from your agency prior to engaging in and carrying out any coal mining and reclamation operations, in accordance with Utah regulations at R614-300-112.400. The surface coal mining and reclamation operations in question pertain to haul and access roads.

In your request for review, you ask that I vacate the TDN's because your agency can take no further action in response to the TDN's until your pending program amendment concerning new definitions of "road" and "public road" is finalized by the Office of Surface Mining Reclamation and Enforcement. You maintain that approval of this proposed amendment is necessary before your agency can request information needed to evaluate the roads in question. Finally, you contend that issuance of the TDN's so soon after promulgation of emergency rulemaking and submission of the program amendment denies your agency reasonable time in which to manage and enforce its program.

Notwithstanding your proposed program amendment, I cannot vacate the TDN's since I am charged by regulation to dispose of each TDN appeal before me by affirming, reversing, or modifying the written determination of the Field Office Director based on the facts surrounding the alleged violation(s). Moreover, I cannot agree with your argument that your agency is without authority under the approved Utah program to make a determination whether the roads in question need to be permitted.

The determination of whether a particular road associated with a mining operation is required to be permitted must be made on a

case-by-case basis by the regulatory authority relying on the plain language of the State program counterpart to the definition of "surface coal mining operations" under section 701(28)(B) of the Surface Mining Control and Reclamation Act (SMCRA). The Utah counterpart at 40-10-3.(18)(b) is identical to the definition in section 701(28)(B) of SMCRA. Both definitions specifically state that surface coal mining operations include "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage...."

In applying the Utah definition to the instant cases, I considered all available facts in the record such as the purpose of construction, who constructed the roads, the relationship of the roads to the existing public road system, the current use of the roads, and the reconstruction, improvement, and maintenance of the roads. In the case of the Cottonwood/Wilberg Road (State Highway 57), the record shows that State Highway 57 was engineered and constructed in 1977-1978 for the purpose of facilitating coal haulage from the mine to the Hunter Preparation Plant, and was paid for by the coal company and secondary revenues. Surfacing improvements were made in 1987 and 1989 due to the impacts of haulage by the primary user, the coal company. These improvements were financed through a surcharge tax to the State by mineral developers. Use of the 5-mile stretch above the State Highway 29 intersection is almost exclusively for coal haulage and access to the mine, and while the 8-mile stretch from State Highway 29 south to the Hunter Preparation Plant receives light use from local farming, recreation, and power plant activities, its predominant use remains coal haulage from the mine to the power plant.

In the case of the Deer Creek Road (Emery County Road No. 3-04), the record shows that the road begins at State Highway 31, passes the entrance to the Huntington Power Plant, continues 0.6 miles to the permit boundary, and then continues another 1 mile within the permit boundary to the Deer Creek Mine gate where the road dead ends. County Road 3-04 was reconstructed with asphalt in 1989-1990 due to deterioration from the primary user, the coal company. This reconstruction was paid for by a surcharge tax on mineral developers to the State, which reallocated funds to the county. Further, the 0.6 miles of the road addressed in the TDN is used almost exclusively for mine-related activities, and according to the county road authority, the Deer Creek Mine is considered the primary user of the road.

Based on the foregoing facts, and in the absence of any specific information provided by your agency which would demonstrate that the roads do not fall within the definition of "surface coal

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mining operations," I find that both roads are within the jurisdictional reach of the Utah program. Accordingly, I hereby affirm the determination of the Albuquerque Field Office Director and order a Federal inspection. That inspection will address the need to revise the permits to include the roads referenced in the ten-day notices.

Sincerely,



W. Hord Tipton
Deputy Director
Operations and Technical Services

cc: PacifiCorp Electric
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